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No. 87-1054

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,
v.
RICHARD BRUCH, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF *AMICUS CURIAE*

The Pension Rights Center submits this brief as *amicus curiae* in support of the Respondents, Richard Bruch et al. Written consent to file this brief has been obtained from the parties and their letters have been filed with the Clerk of the Court pursuant to Rule 36 of the Rules of the Court.

The Pension Rights Center is a nonprofit, public interest organization established in 1976 to protect and promote the pension rights of workers, retirees and their families. The Center is the only organization in the country committed to full-time representation of the interests of pension plan participants and beneficiaries.

The Pension Rights Center provides information and assistance to thousands of pension plan participants and beneficiaries each year. The Center's ability to help individuals to recover pensions they have been denied under the terms of their plans and to receive documents enabling them to establish their entitlement to benefits will be directly affected by the resolution of the issues presented by this case.

SUMMARY OF ARGUMENT

(1) Congress did not intend for the arbitrary and capricious standard of review to be applied where, as in this case, participants are seeking to recover benefits due them under the terms of a plan. That standard of review is generally applicable only to claims brought against plan fiduciaries alleging that the fiduciaries have breached the duty of loyalty owed to participants under Section 404(a)(1) of ERISA (29 U.S.C. § 1104(a)(1)). The distinction between these actions for breach of fiduciary obligation, brought under ERISA Section 502(a)(2), and contractual actions brought under Section 502(a)(1)(B) (29 U.S.C. § 1132(a)(1)(B)) was recognized by this Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985).

Before ERISA, courts typically treated suits against single-employer plans to recover benefits due under the terms of those plans as contractual actions reviewable *de novo*. The legislative history of ERISA makes plain that Congress did not intend to reject this long-standing approach but merely to change the terms of employee benefit plan contracts to correspond to the reasonable expectations of workers.

None of the cases arising under the Labor-Management Relations Act of 1947 (29 U.S.C. § 141) relied on by Petitioners were contractual actions to recover benefits due under plan terms. Rather, all involved claims

that plan trustees had abused discretion expressly conferred by a trust document by adopting plan rules that were not for the exclusive benefit of participants.

Also, contrary to Petitioners' contentions, the ERISA Conference Committee did not grant new discretion to plan administrators to make benefit claims decisions. Neither in the Conference Committee nor any other time did Congress consider proposals that would have required courts to defer to benefit claims decisions made by plan administrators.

Under an arbitrary and capricious standard of judicial review, participants have the burden of proving that a benefit denial constitutes an abuse of discretion by a plan administrator. This is an unrealistic and unduly heavy burden to place on participants seeking to enforce the terms of their plans. Continued application of the arbitrary and capricious standard to actions arising under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), would frustrate ERISA's "overwhelming purpose of protecting the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984).

(2) Congress intended that ERISA Sections 104(b)(4) and 502(c) (19 U.S.C. §§ 1024(b)(4), 1132(c)), requiring disclosure of plan information on request, apply to all former employees who claim eligibility for benefits. It is inconsistent with ERISA's overall purpose of protecting the interests of all participants and beneficiaries to leave to the plan administrator the determination of who is entitled to request information. Participants should not be required to satisfy special conditions in order to obtain information. Allowing participants easy access to information about their benefits will help ensure that participants and beneficiaries will collect the benefits to which they are entitled.

ARGUMENT

I. THE STANDARD OF REVIEW GOVERNING SUITS AGAINST PLAN ADMINISTRATORS FOR BREACH OF FIDUCIARY DUTY IS INAPPLICABLE TO SUITS AGAINST PLANS TO RECOVER CONTRACTUALLY AUTHORIZED BENEFITS.

Petitioners, Firestone et al., contend that since ERISA "grants fiduciaries the discretion to make benefits decisions," judicial review of the Firestone fiduciaries' decision to deny Respondents' claim for termination pay benefits is limited to determining whether the fiduciaries have abused their discretion. Petitioners Brief at 5. Petitioners rely on Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), and Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. Section 186(c)(5) which, they assert, "contain fiduciary responsibility provisions relevant to the standard of review question." Petitioners' Brief at 2.

Petitioners' contentions would be relevant to the issues presented in this case if Respondents had initiated this action against the Firestone plan fiduciaries under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). Such an action would have sought to hold the fiduciaries personally liable under ERISA Section 409 for violation of the duty of loyalty imposed on them by Section 404(a)(1), and judicial review of the fiduciaries' actions would be limited by the trust-based arbitrary and capricious standard.[1]

[1] Section 502(a)(2) provides that a participant may bring an action "for appropriate relief under Section 409." Section 409 states that a fiduciary "who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." Section 404(a)(1) provides in relevant part that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits" and defraying reasonable administrative expenses.

The Respondents, however, initiated this action under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B),

> *to recover employee benefits due them under the terms of* . . . the Firestone Tire & Rubber Company Basic Termination Pay Plan and/or Reduction-in-Force Termination Pay Plan . . . *to enforce their rights under the terms of these Plans and to clarify their rights to future benefits under the terms of these Plans.* (emphasis added) Second Amended Complaint JA 93[2]

As this Court recognized in *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), a Section 502(a)(1)(B) action seeking to recover "contractually authorized benefits" is very different from a Section 502(a)(2) action for "breach of fiduciary obligations".[3]

[2] Section 502(a)(1)(B) provides that a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[3] In *Massachusetts Mutual Life Ins. Co.* v. *Russell*, a beneficiary had initiated a breach of fiduciary duty action under Section 502(a)(2) against Massachusetts Mutual Life for its failure to process the beneficiary's claim for benefits in good faith and in a fair and diligent manner. The Court noted that no Section 502(a)(1)(B) action had been asserted because the beneficiary "has been paid all benefits to which she is *contractually entitled*." (emphasis added) *Id.* at 136.

Justice Brennan, in his concurring opinion, discussed ERISA's "repeatedly emphasized purpose to protect *contractually defined benefits*." (emphasis added). *Id.* at 148 and noted that the ERISA Conference Report emphasized that under Section 502, participants and beneficiaries were entitled not only to recover benefits due under the plan but also to obtain other "relief from breach of fiduciary duty." "(beneficiaries entitled to receive benefits 'as well as to obtain redress of fiduciary obligations')" *Id.* at 153 n.9, citing H.R. Conf. Rep. No. 93-1280 at 326-327 and 120 Cong. Rec. 29933 (remarks of Sen. Williams).

In a Section 502(a)(2) action the claim is ordinarily that fiduciaries have breached the duty of loyalty owed to participants by acting in the administrators' own interests or those of a third person, or that they have acted in bad faith or abused specific discretionary authority expressly conferred on the fiduciaries by the plan document. In a Section 502(a)(2) action "liability . . . is against the fiduciary personally, not the plan," *Id.* at 138, and the recovery "inures to the benefit of the plan as a whole." *Id.* at 140.

In contrast, under Section 502(a)(1)(B) participants usually allege, as they did here, that the plan has wrongly interpreted the "plan contract". They may also claim that the plan has incorrectly calculated a benefit or failed to credit service required by the terms of the plan. Under Section 502(a)(1)(B) liability is against the *plan* and the remedy flows to the *participant*.[4]

[4] Other differences between Section 502(a)(2) actions and Section 502(a)(1)(B) actions are that 502(a)(2) actions can only be brought in federal courts, whereas 502(a)(1)(B) actions can be brought in both state and federal courts. Also, complaints in 502(a)(2) actions must be served upon the Secretary of Labor and the Secretary of the Treasury. There is no such requirement for 502(a)(1)(B) actions. 29 U.S.C. §§ 1132(e)(1) and (h).

ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), provides a "hybrid" equitable cause of action that allows participants to institute actions either "to enjoin any act or practice which violates any provision of this title" or to enjoin any act or practice which violates "the terms of the plan". To the extent that Respondents are seeking injunctive relief in this case, they are asking the court to find that Respondents' construction of the plan was unreasonable and to compel the plan to make payment under the terms of the plan. JA103, 107

II. CONGRESS INTENDED *DE NOVO* REVIEW OF PLAN ADMINISTRATORS' DECISIONS DENYING BENEFITS WHERE PARTICIPANTS ARE SEEKING TO RECOVER CONTRACTUALLY AUTHORIZED BENEFITS.

For purposes of this case, the most significant difference between fiduciary and contract actions is that Congress intended that courts would review Section 502(a)(2) actions under a traditional trust law deferral standard, while applying a *de novo* standard of review to contractual actions brought under Section 502(a)(1)(B).

A. The Legislative History of ERISA Makes Plain That Congress Did Not Intend Courts to Abandon Their Long-Standing Practice of *De Novo* Review Where Participants Are Seeking to Recover Benefits Due Under the Terms of Their Plans.

Before ERISA, courts typically used a contractual approach to cases brought by participants who were seeking to recover benefits under plans set up and administered by a single employer. The courts uniformly reviewed plan administrators' decisions *de novo* and the cases were most commonly decided on unilateral or, in the case of union-negotiated plans, bilateral contract theories. B. Aaron, *Legal Status of Employee Benefit Rights Under Private Pension Plans*, 4-20 (1961).[5] In commenting on the reluctance of the courts to adopt more liberal noncontractual approaches to these cases, Professor Aaron noted, "Indeed it is no exaggeration to say that the one legal principle upon which employees may reasonably rely for protection of their pension bene-

[5] See also D. McGill, *Fulfilling Pension Expectations*, 161-167 (1962). Although there were efforts to apply common law trust principles to suits to recover benefits under the terms of employee benefit plans, they were much less common and generally unsuccessful; P. Harbrecht, *Pension Funds and Economic Power* 170-184 (1960).

fits is that *the typical modern pension plan is an enforceable contract.*" *Id.* at 13.

Before ERISA, most participants were unable to secure benefits because the terms of their employee benefit plan contracts provided them no protection. Either they could not satisfy the unrealistic requirements of the terms of their plans, or there were disclaimers of responsibility, for example, where an individual clearly qualified for benefits, but the plan was inadequately funded.

For this reason Congress' principal objective in enacting ERISA was to *change the terms of the contract.* The law required that all pension plans adopt participation, vesting, benefit accrual and survivors benefit provisions in order to assure that the reasonable expectations of plan participants would be met.[6] As Congressman John H. Dent, Chairman of the General Subcommittee on Labor and one of the four principal authors of ERISA, stated in connection with the submission of the ERISA Conference Report to the House of Representatives "we started out with only one aim in view and that was to give a pension participant his entitlements under the *contract* of the pension plan he belonged to. (emphasis added) (August 20, 1974) 3 *Legislative History of the Employee Retirement Income Security Act of 1974* 4665.

Nowhere in the legislative history of ERISA is there any suggestion that courts should abandon the practice of *de novo* review of contractual actions in favor of a trust law deferral standard.[7] Instead, a consistent theme

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[6] "Congress sought to remedy the predicament of thousands of employees whose expectations of adequate retirement income were destroyed by stingy pension plan provisions, bad management or inadequate funding." *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 136 n.2 (D.C. Cir. 1984).

[7] "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, inter-

throughout the development of the law was that Congress was committed to providing participants with "ready access to the Federal courts" (ERISA Section 2(c), 29 U.S.C. § 1001(c)) both to recover benefits under the terms of their plans and, separately, to sue for breaches of fiduciary duty. Based on pre-ERISA precedent and practice, Congress anticipated that courts would continue to provide participants *de novo* review if the denial of their benefits turned on the construction of plan language, and review under a trust law deferential standard if they were claiming that the denial resulted from improper exercise of discretion.

B. The Pre-ERISA LMRA Cases Cited By Petitioners Do Not Apply to Contractual Actions Seeking to Recover Benefits Due Under Plan Terms.

Petitioners are correct in noting that Congress was familiar with the cases decided under Section 302(c)(5) of the Labor-Management Relations Act of 1947. Petitioners' Brief at 13-14. However, they fail to point out that these cases were not suits to recover benefits due under the terms of a plan. Rather, they were challenges to the trustees' exercise of broad discretionary authority expressly conferred by trust documents.

Unlike single-employer plans, many jointly-trusteed trusts conferred discretion on the trustees to set the plans' benefit eligibility rules.[8] Participants in these plans were, in some instances, able to successfully challenge rules adopted by their trustees by contending that these rules violated the requirement of LMRA Section 302(c)(5) that the trust fund be for the "sole and exclusive benefit of the employees . . ." The courts in these cases found that the rules had no rational basis, had

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related, and interdependent remedial scheme." *Massachusetts Mutual Life Ins. Co.* v. *Russell, supra* 473 U.S. at 133.

[8] N. A. Levin, *Labor-Management Benefit Funds* at 131 (1971).

been adopted without satisfying minimal requirements of due process, or were designed to further the trustees' own personal or institutional interests.[9]

Congress retained participants' rights to challenge trustees' breaches of the duty of loyalty under the LMRA, and incorporated that right into Section 502(a)(2) of ERISA. However, only those participants in jointly-trusteed plans that gave trustees a broad rule-setting mandate were protected by these provisions.

C. ERISA Did Not Grant Fiduciaries New Discretionary Authority to Decide Benefit Claims.

Petitioners contend that in reconciling differences between the Senate and House-passed versions of ERISA, the Conference Committee granted fiduciaries new discretionary authority "to make benefit decisions" and that Congress intended that courts should defer to the exercise of this new discretion under traditional trust law principles of deferral. Petitioners find this grant of authority in the requirement in Section 402(a)(1) that the instrument establishing a plan

> shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a)(1)

They argue that Section 402(a)(1) reflects "an explicit decision" by the ERISA Conference Committee "to give fiduciaries the discretion to decide benefit claims and [to reject] attempts to take claims authority away from fiduciaries." Petitioners' Brief at 15-16.

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[9] The leading cases were brought by participants in the United Mine Workers of America pension fund. Until 1974 the trustees in that fund had "full authority with respect to questions of coverage and eligibility" since all plan rules were set by trustee resolutions. *See UMW Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982).

In support of their interpretation, Petitioners argue that the Conference Committee traded off Section 691(a) of the Senate bill, giving participants the right to arbitrate benefits disputes, in exchange for language adapted from Section 111(a)(1) of the House bill providing that plan administrators were to have "full authority and responsibility for the operation of "employee benefit plans" H.R. 2 passed by the Senate, 3 *Leg. Hist.* 3813-3814; H.R. 2 passed by the House, 3 *Leg. Hist.* 3898.

The reality is that the Conferees granted no new discretion to administrators. Administrators had always had full authority and responsibility for the operation of plans, including the responsibility for deciding benefit claims. Professor Dan McGill, describing a plan administrator's responsibilities in 1962, wrote that the plan administrator "interprets the provisions of plan relating to benefit eligibility and amounts and adjudicates all claims for benefits, whether routine or controversial." *supra* at 22. *See also* J. McNulty, Jr., *Decision and Influence Processes in Private Pension Plans* (1961) at 29.

Petitioners nevertheless seek to convey the impression that the fiduciary provisions adopted by the Conferees were intended to be a substitute for impartial arbitration, and accordingly that a standard of review akin to that for arbitrators' decisions is now appropriate for reviewing plan administrators' benefit claims decisions. The Conferees' decision to drop the Senate arbitration provision, however, in no way signalled an intent to have courts adopt a more deferential standard of review than before in suits to recover contractually authorized benefits.

As a starting point, the benefit claims decision-making functions of plan administrators were the same under both the Senate bill and ERISA. Section 691(a)(1) of

the Senate bill provided that participants whose claims were denied by the plan be given a "full and just review" by the plan administrator. ERISA Section 503(2) calls for a "full and fair review". 29 U.S.C. § 1333(b).

Further, although Sections 691(a)(2), (c) and 694 of the Senate bill gave participants the option of seeking arbitration or going to court (to "recover benefits due") after the administrators had denied their appeals, there was no provision for the arbitrators (or the courts) to defer to the administrators' decisions. The only deference proposed was that courts reviewing arbitrators' decisions should defer to the arbitrators. Thus the elimination of the Senate bill's arbitration provision has no bearing on the issue before the Court, namely the standard for reviewing administrators' decisions.

Not only was the issue of deferring to plan administrators' decisions not addressed by the Conference Committee, it was never addressed during the seven year period that ERISA was being developed. *At no time did Congress consider an approach that would have permitted courts to defer to plan administrators' decisions.*

The sponsors of ERISA did not propose that courts defer to administrators' decisions because they had no illusions about the impartiality of the decision-making process in employee benefit plans. Claims procedures serve an extremely important function, however they were never intended to resemble the kind of neutral forum to which courts traditionally defer.

The purpose of the ERISA claims procedures was to guarantee participants "due process in the *processing* of their benefit claims" (emphasis added). (Remarks of Senator Jacob K. Javits on introducing S.1557, the Administration's bill. April 12, 1973, 1 *Leg. Hist.* 274.) The complexity of ERISA and of plan benefit formulas make it essential that participants be given a chance to demonstrate that errors may have been made in considering their initial claim. Too often, periods of service are not properly credited or benefits are miscalculated.

While the plans' "full and fair" appeals procedures were meant to serve the vital function of allowing workers to substantiate their claims, Congress did not require those procedures to be disinterested. It recognized that most plan administrators are either company owners or officers, who may have either a personal or institutional stake in the outcome of benefit claims disputes, and that often the same person or committee rules on both the initial claim and the subsequent appeal. *See* 29 C.F.R. 2560.503-1.

In other words, Congress recognized and formalized the critically important decision-making role played by administrators in the plans' claims and appeals processes, but never intended to grant them discretion to be the final arbiters of participants' contractual rights.

D. Application of the Arbitrary and Capricious Standard Frustrates the Purposes of ERISA by Requiring Participants to Satisfy an Unrealistic Burden of Proof.

The arbitrary and capricious standard of judicial review in ERISA Section 502(a)(1)(B) cases results in undue deference to plan administrators' decisions and presents an unwarranted barrier to participants seeking to recover benefits under the terms of their plans.

The standard frustrates Congress' protective goal of ensuring that workers and their beneficiaries actually receive the pensions to which they are entitled. The standard is "a highly deferential standard of review," *Anderson* v. *Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985), and "the least demanding form of judicial review." *Pokratz* v. *Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). It favors plan administrators

and other fiduciaries over participants and beneficiaries, imposing on the latter group a "high hurdle." *Kennedy* v. *Doron Precision Systems, Inc.*, 187 U.S.Dist.LEXIS 11990 (N.D. Ill. 1987). A plan administrator's interpretation of plan administrator's interpretation of plan terms, if at all reasonable, will always prevail over a claimant's interpretation, even when it is *more* reasonable. *See McDaniel* v. *National Shopmen Pension Fund*, 817 F.2d 1370 (9th Cir. 1987). Moreover, the plan administrator's interpretation does not even have to be right so long as it was made "rationally and in good faith." *Anderson, supra.*

Even the most liberal of the many variations of the arbitrary and capricious standard would nullify the participants' reasonable expectations concerning their contract rights unless they could prove that a plan administrator's decision is "arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law."

In defense of the rule, the ERISA Industry Committee, as *amicus curiae*, points to its "flexibility", noting that very occasionally, participants have been able to establish bias on the part of the plan administrator and prevail under an arbitrary and capricious standard. ERIC Brief at 13-15. However, as Congressman Barney Frank remarked, at the 1982 hearing cited at page 19 of Petitioners' Brief, proving bias requires participants "to delve into the thoughts [and] decision-making of the plan administrator," something most participants are unable to do. *Pension Legislation: Hearings Before the Subcommittee on Labor-Management Relations of the House Committee on Labor and Education*, 97th Cong., 2d Sess. 60, 150 (1982).

For example, a participant who has been fired as a "troublemaker" may suspect that the plan's unfavorable construction of its terms is motivated by an animus

against him, but unless he is able to sustain the burden of actually proving "arbitrary" action, the plan's decision would be upheld. Similarly, a widow may realize that full payment of her claim for benefits from a small company's profit-sharing plan will significantly reduce the amounts available for the company owner and other employees, thus encouraging an interpretation favorable to the plan, but unless she can prove bad faith, that interpretation would be sustained.

Similarly, an employee who leaves a plan to work for a competitor may make a request for payments from her savings plan at a time, when it would be inconvenient for a plan administrator to liquidate an investment. Even the slightest ambiguity in plan terms could serve as a pretext for delay in making the payments since the administrator's decision would carry with it a presumption of reasonableness. In merger and acquisition situations the problem is particularly acute. Participants may have worked for years in reliance on an informally communicated interpretation of plan terms. It can be all too tempting for a new owner, with no loyalty to these employees, to adopt a new interpretation, shielded by the arbitrary and capricious standard aptly called by some management attorneys "the fiduciary's best friend."

ERIC also argues that "[u]nless the decision below is overturned, more disappointed claimants will be encouraged to challenge adverse decisions, so that the number of cases seeking review of benefit decisions is likely to increase dramatically." ERIC Brief at 12. ERIC offers no support for this assertion. In fact, rejection of the arbitrary and capricious standard for Section 502(a)(1)(B) actions might have the opposite effect. Plan administrators who knew that their decisions would be subject to scrutiny under a *de novo* standard might become less intransigent and more inclined to resolve disputes within the plans' claims procedures. This would relieve the

courts of many suits now being brought—and lost—by participants whose reasonable expectations of benefits have been frustrated by plan decisions that they contend are unreasonable. The courts would, moreover, be protected against frivolous actions by ERISA's attorneys' fees provision, permitting courts to exercise their discretion to award damages against plaintiffs. ERISA Section 502(g), 29 U.S.C. § 1132(g).

Congress enacted ERISA with "the overwhelming purpose of protecting the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service." *Rettig* v. *P.B.G.C.*, *supra* 744 F.2d at 155. That purpose can only be achieved if participants are provided with *de novo* review of actions arising under ERISA Section 502(a)(1)(B).

III. ANY FORMER EMPLOYEE WHO CLAIMS THE RIGHT TO BENEFITS UNDER A PLAN IS A PARTICIPANT WITH THE RIGHT TO REQUEST INFORMATION FROM THE PLAN.

ERISA strengthened the disclosure rights of participants by making information more understandable, more individualized, and more widely available.

The statutory provision for disclosure of information to individual participants demonstrates the emphasis Congress placed on self-help, ensuring that participants and beneficiaries will actually collect the benefits to which they are entitled. Defining the term "participant" so as to include a former employee who claims a right to benefits is consistent with the statutory language and the intent of Congress.

A. A Broad Definition of the Term "Participant" Is Supported by the Statutory Language and the Legislative History of ERISA.

The statutory language.

Petitioners correctly advocate the use of a "plain language" interpretation of the statute but contradict their own position by reading in restrictions that are not in the statute.[10] ERISA generally defines "participant" as a current or former employee who is or may become eligible to receive a benefit, or who has a beneficiary who may be eligible to receive a benefit. Section 3(7), 29 U.S.C. § 1002(7).

Despite this sparse, simple language, Petitioners argue that the phrase "may become eligible" implies that an individual must satisfy numerous prerequisites before requesting information from a plan. §§ 104(b)(4), 105(a); 29 U.S.C. §§ 1024(b)(4), 1025(a).[11] According to this view, it would be the duty of the plan administrator to make a preliminary judgment as to whether the former employee seeking information has met these prerequisites.

An examination of ERISA provisions relating to participant rights supports the argument for a broad, un-

[10] This Court applied a "plain language" interpretation to statutory language in *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980), *NLRB* v. *Plasterers' Local 79*, 404 U.S. 116 (1971) and concluded that a broad, unrestricted reading of the language in question was appropriate.

[11] Examples of restrictions suggested by Petitioners and the lower court include: only current employees and vested, former employees are entitled to disclosure; currently associated with the employer; already received full distribution of benefits; must have reasonable expectation of returning to covered employment; must have a colorable claim to vested benefits; expected to attain eligibility by virtue of the passage of time; must be part of an easily identifiable group that has a substantial interest in the matters conveyed; the written request must show entitlement on its face; the employment history accompanying the request or company records must show current or future eligibility; it should not be "long since" the individual has left employment.

restricted right to request information. For example, although an individual must be a "participant covered under the plan" to be entitled to *automatic* disclosure, § 101(a), 29 U.S.C. § 1021(a), one need only be a "participant" to be entitled to disclosure of information *upon written request.* §§ 104(b)(4), 105(a); 29 U.S.C. §§ 1024(b)(4), 1025(a). Likewise, a "participant" is entitled to use the plan's claims procedure. § 503(2), 29 U.S.C. § 1133(2). Congress could not have intended to complicate what should be the simplest method of plan dispute resolution.

Similarly, the statutory language in the civil enforcement provision of ERISA does not specify any prerequisites to a court-imposed penalty on a plan for failure to disclose information, i.e., the participant is not obligated to show that plan officials were guilty of "bad faith" or "willfulness," or that the participant has been prejudiced.[12]

The real focus in this instance should be on the issue of whether former employees can obtain the information they need to establish that they *are* eligible for benefits, not the scope of the term "may become eligible for benefits." Petitioners' interpretation of the right to request disclosure would place former employees in the Catch-22 situation of being denied the very information they need to prove that they are entitled to request information.[13]

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[12] The better view is that a showing of prejudice as a result of the failure or refusal to respond to a disclosure request is not required because the civil penalty is "punitive in nature . . . [and] not intended to compensate plan participants for injuries." *Porcellini* v. *Strassheim Printing Co., Inc.*, 578 F. Supp. 605, 613-614 (E.D.Pa. 1983).

[13] The narrow Fifth Circuit view cited by Petitioners also relies on the "may become eligible" test to deny disclosure requests. *See Jackson* v. *Sears, Roebuck & Co.*, 648 F.2d 225 (5th Cir. 1981); *See also Nugent* v. *Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980). Both these cases are easily distinguishable from the instant case. Each involved a former employee who admitted that she had not worked enough years to vest but was claiming that, but for her involuntary termination, she would have vested. In contrast, the Respondents are asserting that they are entitled to information because they are currently entitled to benefits. As the Fifth Circuit correctly recognized in a separate case, "at the time of this [disclosure] request, their status was far from clear, and we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement." *Paris* v. *Profit Sharing Plan, Etc.*, 637 F.2d 357, 362 (5th Cir. 1981).

The legislative history.

Petitioners correctly assert that Congress was disappointed with the exclusive monitoring role given to participants and beneficiaries under the Welfare Pension Plan and Disclosure Act.[14] There is no question that ERISA expanded the role of the government in collecting information and protecting plan assets. However, Congress did not abandon the important tool of participant self-help. To the contrary, ERISA increased the amount of general plan information and individualized information available upon request to all participants and beneficiaries. Specifically, ERISA added the right to obtain, *inter alia*: a summary plan description ("plan booklet") that provides a "plain language" explanation of the plan's eligibility rules, § 104(b)(4), 29 U.S.C. § 1024(b)(4); and an individualized benefit statement ("benefit statement"). § 105(a), 29 U.S.C. § 1025(a).

The benefit statement, in particular, provides an extremely valuable tool for protecting one's interests in a pension plan. Unlike the plan booklet or other general plan documents, this is the only document that is "tailor-made." It indicates the individual's benefit amount and

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[14] Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), *amended by* Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, 76 Stat. 35 (1962) (formerly codified at 29 U.S.C. Sections 301 *et seq.*), repealed by ERISA § 111(a)(1), 29 U.S.C. § 103(a)(1).

shows whether the individual has met the plan's length-of-service requirement.[15]

Although there is very little legislative history on the intended scope of the definition of "participant," there is other evidence that Congress did not intend to restrict the former employee's right to disclosure. In a predecessor bill to ERISA, a "participant" was defined as an active employee, and a "beneficiary" as "an individual who is receiving (*or claims a right to receive*) benefits under a qualified plan." (emphasis added).[16]

Congress was well aware that participants gain from having financially-stable plans as well as from having information about their plans. The disclosure provisions of ERISA reflect the extensive effort that was made to minimize the burden on plans. To illustrate, the administrator may make a reasonable charge for providing copies of all the general plan documents that are requested, § 104(b)(4), 29 U.S.C. § 1024(b)(4). Also, the plan is required to provide a participant with only one benefit statement within a twelve-month period. § 105(b), 29 U.S.C. § 1025(b). An obvious, but significant limitation that Petitioners fail to point out, is that information provided upon request need only be sent to the former employee who identifies himself to the plan (and presumably, provides a return address). These provisions apply only to specific individual requests and clearly do not require plans to "track down" every former employee.

In addition, there are numerous statutory exemptions to the disclosure rules.[17] Nevertheless, relief from the

[15] The individualized benefit statement was considered "one of the greatest reforms in the whole bill" because it enabled a participant to "understand exactly . . . where he stood at the moment of his inquiry." H.R. Consideration of Conference Report to accompany H.R. 2, 93d Cong., 2d Sess. (1974), 3 *Leg. Hist.* 4655.

[16] S. Rep. No. 383, 93d Cong., 1st Sess. (1973), 1 *Leg. Hist.* 1185.

[17] The statutory exemptions are available, *inter alia*, to various types of plans as well as to smaller plans. *See, for example*:

disclosure requirements was not provided at the expense of participants and beneficiaries. In certain circumstances, ERISA does permit an "alternative method of compliance." The plan administrator, however, may obtain an exemption from the Secretary of Labor only if the Secretary has determined that the alternative method still provides adequate disclosure and that following the standard rules would harm the plan and the interests of the participants. Section 110, 29 U.S.C. § 1030.

A comparison of the various methods of disclosure available under ERISA reveals a deliberate design by Congress to balance the burden on the plan according to the number of individuals eligible for disclosure, i.e., the burden on a plan narrows as the category of recipients expands. As an example, the general public may inspect certain plan documents (such as annual reports and plan booklets) filed with the Department of Labor, a method least burdensome to plans. § 104(a)(1), 29 U.S.C. § 1024(a)(1). A more demanding requirement is a plan's obligation to provide other documents (such as summary plan booklets) automatically and without charge, but this requirement extends only to "covered participants and beneficiaries receiving benefits." § 101(a), 29 U.S.C. § 1021(a). Between these two extremes lies the right of "participants and beneficiaries" to view documents at the plan office and to request documents from the plan, §§ 104(b)(2),(4), 29 U.S.C. §§ 1024(b)(2), (4). Thus, it is consistent with the statutory scheme and not overly burdensome to allow individual former employees who claim eligibilty to request information from their plans.

The benefits of a broad disclosure right will far outweigh the costs to plans. It is highly unlikely that plans will be flooded with frivolous requests from persons with

29 U.S.C. §§ 1023(a), 1023(b)(4), and 1024(a). In addition, Congress was careful to limit the frequency with which these documents must be provided. *See* 29 U.S.C. Sections 1024(a)(1)(B), 1024(b)(1) and 1025(b).

no genuine interest in learning about their benefits. (In fact, too few people seek to understand their plan provisions, according to a recent government study.)[18] Providing greater access to this information means that more participants will be able to evaluate their own claims and guage the worth of pursuing an administrative appeal or litigation.

Given the extensive effort of Congress to avoid burdening plans unnecessarily, the purpose of ERISA would be best served if a "claim of undue burdens is properly addressed to Congress, not this court." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 123-124 (1980).

B. An Inclusive Disclosure-of-Information Requirement Serves The Purposes of ERISA By Making It Easier For Individuals To Claim Benefits.

There are over a million private pension and welfare plans in the nation. Although ERISA establishes the minimum standards for these plans, benefit eligibility rules vary widely from plan to plan, leaving employees dependent on obtaining specific information from their respective plans. Eligibility for benefits may rest on whether an employee has met a complicated length-of-service rule or whether the employee can prove certain facts.

Under the restrictive disclosure rules advocated by Petitioners, there is a danger that a plan administrator might wrongly assume that a former employee is not eligible for benefits and therefore not entitled to the information. Yet, without the information they need, former employees who reasonably believe they are eligible

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[18] *See* Briefing Report to the Chairman, House Select Committee on Aging, 100th Cong., 1st Sess., *Pension Plans: Many Workers Don't Know When They Can Retire* (General Accounting Office (HRD-87-94BR, 1987). This study found that over 70% of the 25 million workers in pension plans were not correct about when they would be eligible for normal retirement benefits, at 2.

for benefits will be unable to determine what proof they must gather or whether the administrator is applying the plan rules incorrectly.

Since the plan administrator is not required to be a legal expert (or to have any other particular skills), an erroneous determination is not improbable.[19] In a small plan, the "administrator" may be the small business owner himself.

Furthermore, where the employer serves as the administrator, as in this case, there is the obvious risk of a conflict of interest. Surely a "self-selecting" interpretation, as Petitioners label the appellate court approach that lets the individual determine that information is needed, is superior to an "administrator-selecting" interpretation. Allowing the administrator to deny information on the basis of a preliminary judgment about the employee's eligibility adversely affects the rights of participants. Meritorious claims for pension benefits may be lost, plan sponsors will gain unfairly, and the courts will be clogged with unnecessary claims from those individuals who have the means to litigate. Excluded will be the many participants who cannot afford to file a lawsuit in order to merely obtain information needed to establish eligibility to a small pension.[20]

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[19] The plan administrator can be the plan sponsor, or can be designated by the terms of the plan, 29 U.S.C. § 1002(16).

[20] Participants may decide on their own that the effort involved in fighting for the information is not worth the potential benefit. Or the plan administrator may actively discourage future claims by paying out inaccurate lump sums and then claim that the requestor is no longer eligible for benefits, and thus, no longer eligible for disclosure. The employer who has "unchecked power to make a final distribution of a participant's interest . . . would be totally insulated from inquiry concerning an ex-employee's rights under the plan. Congress could not have intended such an inequitable and absurd result." *Hager* v. *VECO Corporation*, 1 Employee Benefit Cases 1827 (N.D. Ill. Aug. 16, 1979).

Unlike employees with workers compensation or age discrimination claims, individual workers asserting rights under ERISA cannot look to any government agency to resolve their cases. Also, unfortunately, the Labor Department does not adequately carry out the reporting and disclosure responsibilities that are assigned to it, and its records are often out of date or incomplete. *See* Staff of Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 99th Cong., 2d Sess. *The Department of Labor's Enforcement of ERISA* (S.Prt. 99-144, at 25, 1986).

A right to request information that extends to former, as well as current, employees who claim eligibility is essential to ensure that workers and retirees receive the pensions to which they are entitled.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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August 15, 1988